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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CRAIG LAMAR REID, Defendant and Appellant.	C047359 (Super. Ct. No. 02F05094)

A jury convicted defendant Craig Lamar Reid of first degree robbery (Pen. Code, § 211),[1] and the court found he had one prior serious felony conviction (§ 667, subd. (a)), one prior "strike" within the meaning of the "three strikes" law (§§ 667, subd. (d), 1170.12), and had served one prior prison term (§ 667.5, subd. (b)). The jury acquitted him of possession of a

[1] All further statutory references are to the Penal Code unless otherwise indicated.

gun by a convicted felon (§ 12021, subd. (a)) and found that he had not personally used a firearm in the commission of the robbery (§ 12022.53, subd. (b)).

Sentenced to 18 years in prison, defendant appeals, contending (1) the trial court prejudicially erred in admitting a witness's extrajudicial statements as spontaneous declarations, (2) the admission of those statements violated the confrontation clause as interpreted in *Crawford v. Washington* (2004) 541 U.S. __ [158 L.Ed.2d 177] (*Crawford*), and (3) the court's selection of the upper term violated the principle set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. __ [159 L.Ed.2d 403] (*Blakely*). We shall affirm the judgment.

FACTS

In 2002 Pete Fagre was an independent contractor with Yellow Cab. He leased the cab and received fares by responding to calls from the Yellow Cab dispatcher and to his own cellular telephone. To generate business, Fagre distributed business cards around town, including at the Exxon station at the corner of Fulton and Marconi Avenues.

On June 5, 2002, at approximately 4:00 a.m., Fagre received a call from Exxon employee Gordon Hoeft that some customers needed a ride. When he arrived, defendant and Genea Smith were waiting outside. Defendant wanted Fagre to take them to Vince's Motel on Folsom Boulevard in Rancho Cordova.

During the 15-minute drive, Fagre and defendant talked about the job corps and about drugs. Defendant asked Fagre

whether he used drugs in order to stay awake so he could work at night. Fagre said he had not done drugs in over a year. Defendant said he had done them in the past and had just been released from jail. When Fagre dropped defendant off, defendant told him he was a good cab driver and asked for his business card.

At approximately 6:30 p.m., Fagre received a cellular telephone call from defendant, asking him for a ride. When Fagre arrived at the corner of Martin Luther King Boulevard and 21st, Smith and defendant entered the cab. Halfway though the trip, defendant whispered to Smith and the two became quiet. Defendant told Fagre to take the El Camino Avenue exit. Fagre refused because it was not the proper exit. Fagre exited at Marconi Avenue and, as he attempted to move into the left lane, defendant told him to keep going. Defendant then instructed Fagre to pull over. Smith got out of the car and walked down the street. Defendant also got out and appeared to be looking for his money. Defendant told Smith, "[B]itch, get back here, give me my money." She responded, "I don't have any money, you know that." Smith got back in the car[2] and defendant said he needed to go to the "ATM" to get some money. Fagre suggested the Bank of America, which was close by, but defendant refused. Defendant told Fagre to drive to Edison and Howe Avenues, where he could get money from his friends. As they approached the

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[2] Fagre could not recall whether defendant pulled Smith into the car.

intersection, defendant said his friends were not home and instructed Fagre to turn left on Howe Avenue. As they passed Rainbow Street, defendant said he saw his aunt's car and told Fagre to pull over. Smith got out of the cab and started walking down the street. Defendant came up behind Fagre, put a gun that was wrapped in a coat up to his head,[3] and said, "[T]his is a robbery, mother fucker, give me the money or I'll blow your fucking head off." Fagre handed defendant $180.

Fagre immediately called 911 and said he had been robbed.[4] Defendant had disappeared, but Fagre saw Smith two or three minutes later on the next street. Smith tried to flag down several cars and succeeded in getting a Mazda to pull over and let her in. Fagre followed the Mazda.

Jasmine Washington was driving the Mazda. She saw Smith, who she believed was 18 or 19 years old, running to the middle of the street waving her arms back and forth, looking frightened, scared, and shaken up. Her hair was messed up, her breasts were hanging out of her shirt, and she looked as though she was running away from something. Washington asked Smith if she was okay. She said "no" and that her boyfriend had beaten her up. She was crying. Once inside Washington's car, she was shaking and talking loudly, like she was hysterical. Smith asked to be taken home.

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[3] Fagre testified he could feel the barrel of the gun but did not actually see it.

[4] The police reported the call as coming in at 7:37 p.m.

After driving approximately two blocks, Washington noticed a taxicab behind her and wondered aloud why it was following her. Before they reached Fulton Avenue, Washington heard sirens and saw two police cars coming toward them. Smith then said that her boyfriend had robbed the cab driver but she did not know he was going to do it. She also said that she did not do it.[5] The police pulled them over at gunpoint and handcuffed them.

Sacramento County Sheriff's Deputy Matt Curtis interviewed Fagre shortly after he observed Fagre following the Mazda. Fagre was visibly upset, shaking, having a hard time talking, and chain smoking. Fagre said that when he gave the money to defendant, both Smith and defendant got out of the car and then defendant took off. Fagre never said he actually saw the gun.

Smith directed Sheriff's Sergeant Kenneth Georges, Deputy Curtis, and Deputy Aaron Zelaya to an apartment at 2401 Marconi Avenue, a little over a quarter of a mile away from the robbery. Defendant's mother, Terry Reid, was inside the apartment. Terry Reid said that defendant had arrived at her apartment at

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[5] When asked on cross-examination whether Washington told a detective that Smith told her to tell the police that she (Smith) did not do it, Washington said she might have and that "sounds pretty correct." Washington said that her statement to the detective and her testimony were "[p]retty much the same statement." Defense counsel noted that the difference was whether or not Smith directed Washington to tell the police that she did not do it. Washington said it was the same statement: "She told me she didn't do it. She didn't know her boyfriend was going to do it. Then she said I didn't do it, I didn't do it."

approximately 8:30 p.m., yelling to be let in. He was sweaty and agitated and kept asking, "[W]here is the girl[?]" He came inside and changed his clothes. She overheard him saying on the telephone that he had just gotten some money and that he called for a cab. Defendant stayed for 25 to 30 minutes. At trial, Terry Reid denied making these statements.[6]

On June 12, 2002, deputies found defendant hiding in the bedroom closet of one of the apartments at the complex where his mother lived. Investigators from the Sacramento County District Attorney's Office unsuccessfully tried to locate Smith, using her aliases, past addresses, and other identifying data.

Defendant testified in his own behalf. In June 2002 he was a cook at A Touch of Class and on the side sold rock cocaine from a house located between 21st and 36th Avenue. He had known Smith for a couple of weeks and thought she was a prostitute.

On June 5, 2002, he wanted to buy snacks from the Exxon station and then go to Vince's Motel with Smith. He saw Fagre and Smith talking, so he assumed they knew each other. In the cab on the way to the motel, Fagre said he used drugs and asked defendant if he knew where to get drugs. Fagre gave Smith his business card and said he would check with defendant later. Defendant and Smith spent the night at a friend's motel room.

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[6] Terry Reid had felony convictions for check fraud, assault with force likely to produce great bodily injury, and false impersonation.

In the morning, defendant had a friend take him to 21st and Martin Luther King Boulevard so he could sell drugs.

Smith pulled up to the house at that location in a cab and told defendant that she wanted to purchase an "eight ball," or about four and a half grams, of drugs. Defendant weighed out the amount, and Smith paid him $80 and left the house, heading in the direction of the cab.

Smith came back 10 minutes later and said that "the person" wanted something bigger. Defendant went outside. Fagre honked his horn and Smith waved at defendant to come inside the cab with her. Defendant initially wanted to go to his mother's house, where he kept larger amounts of drugs, but instead they went to Hubacher Cadillac to see if his car was ready. Defendant's girlfriend, Beverly Vickers, had dropped it off the previous morning.[7]

Defendant then directed Fagre to his mother's apartment complex, where defendant gave his mother drugs, changed clothes, and weighed the drugs he was going to give to Fagre. When he returned to the cab, Smith was no longer there. Fagre asked for the "stuff" and defendant asked for money. Fagre said he had already given defendant the money. Defendant started looking for Smith while Fagre followed in his car. Fagre said he did not have time for this, asked defendant to give him what he came

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[7] According to the service manager at Hubacher Cadillac, there was no record of a Cadillac being brought in for service, under the name of either Reid or Vickers, on June 4 or 5, 2002.

out there for, and told defendant that if he did not, Fagre was going to call the police and claim defendant had robbed him.

DISCUSSION

I

The court admitted, as spontaneous declarations, Smith's statements to Washington that her boyfriend had beaten her, that her boyfriend had robbed the taxicab driver, and that she did not do it, and her request that Washington tell the police Smith did not do it. The court reasoned that the statements were reliable because they paralleled the victim's account[8] and Smith may have been surprised by the gun. The court further reasoned, "One can understand that when she first makes her statement to Washington, if she's just been involved unwittingly in a robbery she doesn't want to reference a robbery when she comes up with another spontaneous statement to Washington as to what happened, and then as soon as the police pull in behind her vehicle, she claims that a robbery occurred and she didn't have anything to do with it. So they fit the requirements of spontaneity."

Defendant contends on appeal that Smith's statement about the beating was irrelevant, unreliable, and inconsistent, and the statements about the robbery were made after Smith had time to reflect. He further argues that the admission of this evidence violated his right to confrontation as enunciated in

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[8] In discussing these issues, the People represented that Fagre was going to testify he saw Smith attempt to exit the car and that defendant grabbed her, threw her back in the car, and told her, "Get back in the blanking car."

Crawford, *supra*, 158 L.Ed.2d 177. We find the trial court abused its discretion in admitting the evidence but find the error harmless beyond a reasonable doubt.

Smith's Statement About the Beating Was Irrelevant

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Relevant evidence means "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although there is no universal test of relevancy, the general rule in criminal cases is whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) A trial court's ruling on whether evidence is relevant is reviewed under the abuse of discretion standard. (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Defendant was charged with robbery, possession of a gun by a convicted felon, and personal use of a firearm. To prove these crimes and the enhancement, the People did not have to establish that Smith was beaten. Moreover, Smith's statement about the beating was unnecessary to explain why Washington stopped to help Smith. Washington's testimony already established that when she saw Smith running into the street and waving her hands in the air, Smith looked frightened, scared, and shaken up, and her hair was disheveled. Even the People noted, "I could see that [*sic*] defense wanting the other -- the

first statement excluded just on sheer relevancy grounds, which would be fine with me . . . ."

We therefore conclude that Smith's statement that her boyfriend had beaten her was inadmissible because it was irrelevant.

Smith's Statements About the Robbery Were Not Spontaneous

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*), quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468.)

Whether these requirements are satisfied is "largely a question of fact," the determination of which is left to the trial court's discretion. (*Poggi*, *supra*, 43 Cal.3d at p. 318.)

We review the factual determinations for substantial evidence and the ultimate decision of whether to admit the evidence for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

The key factor that makes a statement spontaneous is "the mental state of the speaker." The intent of the exception is to allow out-of-court statements that are "undertaken without deliberation or reflection." (*People v. Farmer* (1989) 47 Cal.3d 888, 903 (*Farmer*), disapproved on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) "[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*Farmer*, *supra*, 47 Cal.3d at p. 903.)

There is insufficient evidence to establish that Smith made the statements about the robbery while her reflective powers were in abeyance. When Washington asked what had happened, Smith told her that her boyfriend had beaten her. It was not until after they had driven two blocks, after Washington had wondered aloud why the taxicab was following her, and after they heard sirens and saw two police cars coming toward them that Smith made the statements about the robbery that implicated defendant and exculpated her. As the trial court recognized, Smith initially may not have wanted to reference the robbery when she got into Washington's car, but when the police cars pulled up, she then claimed the robbery occurred and that she

had nothing do with it. The likelihood that Smith's statements were the product of reflection instead of spontaneity in the stress of nervous excitement undermines their trustworthiness. The court abused its discretion in admitting the statements about the robbery as spontaneous declarations.

The Admission of the Statements is Harmless Beyond a Reasonable Doubt

For purposes of this analysis, we shall assume without deciding that admitting Smith's statements was constitutional error under *Crawford*. *Crawford* held that out-of-court statements by a witness that are testimonial are barred under the Sixth Amendment's confrontation clause unless the witness is shown to be unavailable and the defendant has had a prior opportunity to cross-examine the witness, regardless of whether the trial court deems the statements reliable. (*Crawford*, *supra*, 158 L.Ed.2d at pp. 198-199.) Reversal is compelled unless the error in admitting the evidence is "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] (*Chapman*); *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [89 L.Ed.2d 674, 686]; *People v. Pirwani* (2004) 119 Cal.App.4th 770, 790-791) [applying *Chapman* to *Crawford* confrontation clause violation].)

The People relied on evidence independent of Smith's statements to prove that defendant robbed Fagre, including Fagre's own testimony, his demeanor following the robbery, and defendant's mother's statements to detectives on the night of the robbery. Fagre testified that defendant put a gun wrapped

in a coat to his head and demanded money. Fagre immediately called 911 and followed Smith and the Mazda. The veracity of Fagre's version of events was bolstered by Deputy Curtis's description of Fagre shortly after the robbery: he was visibly upset, shaking, and having trouble talking.

The statement of defendant's mother to deputies also corroborated Fagre's claim that defendant robbed him. According to Deputy Zelaya, Terry Reid said that defendant had come to the door at approximately 8:30 p.m., was sweaty and agitated, asked where the "girl" was, changed his clothes, and said that he had just gotten some money.

Moreover, defendant's version of events was directly contradicted by an employee of Hubacher Cadillac, who had no record of defendant's car being at the dealership on June 4 or 5, 2002, despite defendant's testimony that Fagre drove him there to check on it.

While no other testimony was presented that defendant had beaten Smith, except for Fagre's statement that defendant called Smith a "bitch," ordered her back to the car, and demanded money, this evidence could not have prejudiced the jury against defendant. Instead of simply convicting defendant on all counts, the jury acquitted him of being a felon in possession of a gun and of the gun use enhancement attached to the robbery count.

Given this record, the court's admission of Smith's statements was harmless beyond a reasonable doubt. We therefore

need not address whether the court's admission of Smith's statements violated the confrontation clause.

II

The court imposed the upper term for defendant's robbery conviction for the following reasons, noted in the probation report: the offense required planning; defendant has engaged in prior acts of violent conduct; his prior convictions are substantial;[9] defendant has served a prior prison term; and defendant's performance on parole has been unsatisfactory. The court specified it did not find any circumstances in mitigation.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi* that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt.

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[9] The probation report recounted that defendant had the following convictions: felony burglary, attempted receipt of stolen property, and possession of cocaine, all in Ohio in 1991; second degree robbery (Pen. Code, § 211) in 1994, when defendant robbed a video store clerk at gunpoint; and misdemeanor battery (Pen. Code, § 242) in 2000, when defendant became "physical" with his wife after she called police to report an argument with him. He had also been arrested for the following offenses: assault with intent to commit mayhem/rape (Pen. Code, § 220) while armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) in 1993, where defendant displayed a handgun to a man and his girlfriend after he loaned the man $50 and demanded sex from the girlfriend as repayment; and driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364) in 2002, which case had been continued as of the date of the probation report.

(*Apprendi*, *supra*, 530 U.S. at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely*, *supra*, 159 L.Ed.2d at pp. 413-414.)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term is defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to the prior convictions, in deciding whether to impose the upper term did not violate the rule of *Apprendi* and *Blakely*.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.